

# Exhibit 1

## SEALED TRANSCRIPT

1

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, ) **Corrected Transcript**  
 ) **(Corrections made to page 21,**  
 v. ) **line 10, and page 28, line**  
 ) **10)**  
ZACKARY ELLIS SANDERS, )  
 )  
 Defendant. ) Criminal No. 20-143  
 )

---

Alexandria, Virginia

September 11, 2020

**SEALED TRANSCRIPT**

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE T. S. ELLIS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: WILLIAM CLAYMAN, AUSA  
U.S. Attorney's Office  
2100 Jamieson Avenue  
Alexandria, Virginia 22314

For the Defendant: JONATHAN STUART JEFFRESS, ESQ.  
JADE CHONG-SMITH ON BEHALF, ESQ.  
KaiserDillon PLLC  
1099 14th Street NW  
8th Floor West  
Washington, DC 20005

Court Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR  
United States District Court  
Eastern District of Virginia  
401 Courthouse Square  
Ninth Floor  
Alexandria, Virginia 22314

Proceedings reported by stenotype shorthand.

SEALED TRANSCRIPT

2

1 Transcript produced by computer-aided transcription.  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## SEALED TRANSCRIPT

3

1 P R O C E E D I N G S

2 (10:48 a.m.)

3 THE COURT: All right. You may call the next matter,  
4 please.

5 THE DEPUTY CLERK: The Court calls Criminal Case  
6 United States of America versus Zachary Ellis Sanders, Case  
7 Number 2020-CR-143.

8 May I have appearances please, first for the  
9 government.

10 MR. CLAYMAN: Good morning, Your Honor. Bill Clayman  
11 and Maya Song for the United States.

12 THE COURT: All right. Good morning to both of you.  
13 And for the defendant?

14 MR. JEFFRESS: Good morning, Your Honor. Jon  
15 Jeffress and Jade Chong-Smith on behalf of the defendant.

16 THE COURT: Good morning to both of you.  
17 Who will argue today on behalf of the defendant?

18 MR. JEFFRESS: I will.

19 THE COURT: All right. First of all, I have already  
20 resolved the motion for reconsideration. I don't need to  
21 hear anything, don't want to hear anything about that. I  
22 have no doubt, Mr. Jeffress, that you think I've missed it  
23 again, and that's all right. That's what your job is.  
24 You'll have an opportunity to persuade other judges that I  
25 have made an error. If you succeed, you will not be the

1 first to succeed in that regard.

2 MR. JEFFRESS: Thank you.

3 THE COURT: Secondly, I don't need or want to hear  
4 anything about -- I think the government spent half a  
5 paragraph or a page on whether or not the reaction to my  
6 striking the first brief and their then filing hundreds of  
7 pages was improper, insolent, or whatever the government was  
8 suggesting. I don't want to hear anything about that.

9 Let me just say this: In the future, whether it is  
10 the government or the defendant, if you need additional  
11 pages, you request it. You don't file the additional pages  
12 and ask for it. That's what I call the BFA: brute force and  
13 awkwardness. You ask permission first. In any event, all  
14 that's gone. I'm not interested in that anymore. I'm  
15 interested in the merits of the various motions to suppress.  
16 Over a hundred pages have been filed, and I have been  
17 reviewing all of that. I want to hear your arguments today.  
18 I'm going to give you each 30 minutes of pretty much, I  
19 think, unfettered time to tell me anything you want to tell  
20 me to make sure I don't miss anything.

21 All right. Mr. Jeffress, you may begin, sir.

22 MR. JEFFRESS: Thank you, Your Honor.

23 And I do appreciate it, Your Honor. I know we have  
24 given Your Honor a lot to consider.

25 I want to start with actually the second motion to

1 suppress that we filed, which is the motion to suppress  
2 addressing the -- what we believe has been the misleading  
3 nature of paragraph 23 of the affidavit. And under this  
4 motion, Your Honor, we are also requesting a *Franks* hearing,  
5 as the process is a two-step process. We believe that we've  
6 more than established our burden to a *Franks* hearing, and I  
7 would like to explain to Your Honor why. I do believe, Your  
8 Honor, motion to suppress number two is -- is open and shut  
9 in terms -- in terms of whether we get a *Franks* hearing. And  
10 that is because of the extremely misleading nature of  
11 paragraph 23.

12 This warrant is very unusual in my experience. The  
13 affidavit. I'm sorry. The entire case, the entire case for  
14 probable cause is essentially turning on one sentence of one  
15 paragraph. There is no other paragraph that even -- or  
16 sentence in the affidavit that even purports to link the IP  
17 address that is linked to Mr. Sanders to any form of criminal  
18 activity. Everything else is certainly -- is about the  
19 officer's background and experience, his expertise, other  
20 things that are not case-specific and that do not relate to  
21 this internet user's activity. So paragraph 23 -- and the  
22 government would agree -- is the crux of the affidavit. It  
23 is the only paragraph that makes any allegation of any  
24 criminal activity or even suspicious activity by the IP user  
25 -- by the IP address that has eventually been linked to

1 Mr. Sanders.

2 And, you know, what I would like to do, if I can hand  
3 this up just so we can all follow together --

4 THE COURT: I have it in mind. I have seen it more  
5 than once, as you might imagine.

6 MR. JEFFRESS: Okay. So, Your Honor, paragraph 23,  
7 as Your Honor knows, states that, "In August 2019, a foreign  
8 law enforcement agency known to the FBI and with a history of  
9 providing reliable, accurate information in the past,  
10 notified the FBI that the FLA determined that on May 23,  
11 2019 a user of IP address" such-and-such, quote, "accessed  
12 online child sexual abuse and exploitation material via a  
13 website that the FLA named and described as the target  
14 website." Okay.

15 So that right there, that sort of vague language is  
16 the only allegation in the entire affidavit linking this IP  
17 address to any form of criminal activity. And the question I  
18 think -- the initial question is what did this suggest to the  
19 magistrate. What does it mean? And what it told the  
20 magistrate -- and I think what the Court has accepted that  
21 this implies or strongly suggests or even states -- is that  
22 this IP address is linked to criminal activity; that this IP  
23 address was used to view or download child pornography, that  
24 that's what the foreign law enforcement agency was telling  
25 the FBI.

1           Now, that, Your Honor, is not true. The special  
2 agent well knew, when he repeated the FLA's tip in paragraph  
3 23, that the FLA did not have evidence of the IP user viewing  
4 or downloading child pornography. He knew that the FLA had  
5 evidence only that the IP user had visited this particular  
6 website one time for one second. That's it.

7           Now, the Court has repeatedly -- and I think based on  
8 some of the arguments the government has made here -- come  
9 to -- both in the memorandum opinion denying our initial  
10 motion to compel and then on this reconsideration opinion --  
11 has come to the same mistaken conclusion that the magistrate  
12 came to surely, which is that no, what this is saying is that  
13 IP address linked to Mr. Sanders viewed and downloaded child  
14 pornography. That's what it's saying. And that's a very  
15 reasonable interpretation of 23 -- or 23.

16           What we know from many other sources -- now, the  
17 government, I will say, in litigating the motion to compel  
18 and in imposing these motions to suppress, have never told  
19 this Court what the special agent's understanding of that  
20 paragraph was. They have never said it. That is an  
21 extremely unusual position for us to be in. They have never  
22 answered the million dollar question in this case, which is  
23 what did the special agent think of that when he got that tip  
24 and what was the agent thinking when he repeated that tip in  
25 this affidavit. The government has refused very



1 conspicuously to ever actually directly answer that question  
2 to the Court. And that litigation strategy should tell this  
3 Court a lot about what is going on here.

4 The government has access to this agent whenever they  
5 want. Surely, the government has spoken to the agent about  
6 what he understood this to mean. But the government has  
7 never directly said, hey, the agent thought that that meant  
8 Mr. Sanders -- the IP address associated with Mr. Sanders  
9 viewed and downloaded child pornography. And they haven't  
10 said that because it is not true. That is not what the agent  
11 thought. Now, that's why we moved to compel.

12 The government refused to tell us what was the  
13 agent's understanding. Just say, we have talked to the  
14 agent, the agent thought that meant he viewed or downloaded  
15 child pornography. They've never said that. They've refused  
16 to say that in this litigation.

17 THE COURT REPORTER: Mr. Jeffress, slow down, please.  
18 Repeat the last sentence.

19 MR. JEFFRESS: That's why we moved to compel to try  
20 to see if there was evidence -- e-mails, reports, other  
21 things -- that would have shown what the agent's state of  
22 mind was and would have showed that the agent either  
23 understood -- or we believe he understood -- was that all  
24 this meant was that the agent -- I'm sorry -- that  
25 Mr. Sanders, the IP address linked to Mr. Sanders went to

1 this website one time for one second, or whether he thought  
2 what this clearly implies and what the Court has said this  
3 clearly states, which is that it means that he viewed or  
4 downloaded child pornography.

5 Those are very different cases for probable cause, as  
6 I'm sure the Court appreciates. Viewing -- going to a  
7 website that has a mix of illegal and legal content and  
8 doesn't have anything on the home page of the website that is  
9 illegal one time for one second is a very different case for  
10 probable cause than having evidence that someone actually  
11 went onto the website, registered for the website, logged  
12 into the website, and viewed or downloaded child pornography.  
13 That is night and day in terms of the probable cause  
14 analysis. The government suggests -- paragraph 23 suggests  
15 they had the latter, when in fact all they had is one time  
16 for one second.

17 Now, how do we know -- the Court said it is just rank  
18 speculation on our part that the agent actually knew that it  
19 was just the one time for one second. I have to respectfully  
20 disagree with the Court, and let me explain why.

21 First, there are the other paragraphs of the  
22 affidavit itself. If you go to affidavit paragraph 6, which  
23 is at the beginning of the affidavit -- the Court's  
24 indulgence -- that paragraph states -- and this is in the  
25 first paragraph under "Background of the investigation and

1       probable cause," that is the title of this section. And what  
2       that paragraph states is: "There is probable cause to  
3       believe that a user of the internet account at the subject  
4       premises," which means Mr. Sanders' parents -- I'm sorry --  
5       they left, Your Honor, but they were here -- at their home.  
6       "There is probable cause to believe that a user of the  
7       internet account at the subject premises accessed the target  
8       website as further described herein." That's it. "Accessed  
9       the target website." Now, what he means -- I think there is  
10      some confusion about what the word "access" means. What he  
11      means there, the truthful and accurate definition of "access"  
12      in that paragraph is visited, visited the website. That's  
13      what is described here.

14               Then we turn to page 15 of the affidavit, which  
15      summarizes the evidence related -- quote -- this is the  
16      quote -- the title of this section -- "Evidence related to  
17      identification of the target that accessed the website."  
18      Once again, that "accessed the target website." They're not  
19      saying he accessed child pornography. They're not saying the  
20      target viewed child pornography. They're just saying that  
21      accessed the target website, and what he meant there was  
22      visited the target website because that is all the evidence  
23      we have.

24               We then turn to paragraph 29 -- and this, Your Honor,  
25      I think is the clincher. This is when I knew a hundred

1 percent that we were right that all they had was visiting the  
2 website; that he knew that all they had was visiting this  
3 website one time for one second. And what 29 states is,  
4 "Accordingly" -- this is the paragraph -- this is the one  
5 that they have summarized all of the evidence. He marshals  
6 it, and he summarizes it, and it's his entire case for  
7 probable cause. That is what 29 is.

8 I know the Court has probably seen millions of these  
9 affidavits in its -- in its experience. I have seen probably  
10 a far lower number, but this is like the wind-up-paragraph.  
11 Right? This is the one where you describe everything you  
12 got. And you say, Judge, here is our case for probable  
13 cause.

14 What 29 says is, "Accordingly, based on my training  
15 and experience" -- this is the penultimate paragraph of this  
16 section -- "based on my training and experience and the  
17 information articulated herein, because accessing the target  
18 website required numerous affirmative steps by a user --  
19 including downloading TOR software, accessing the TOR  
20 network, finding the web access for the target website and  
21 then connecting to the target website via TOR, those four  
22 things. Because those affirmative steps were taken by the  
23 user, "it is extremely unlikely that any user could simply  
24 stumble upon the target website without understanding its  
25 purpose and content."

1           So that is a case for probable cause based on a  
2 truthful and accurate recitation of what the government's  
3 evidence was, which that they had a tip that he went to the  
4 website one time for one second.

5           And then third, the conclusion of that section, "For  
6 all the reasons described herein, I submit that there is  
7 probable cause to believe that any user who accessed the  
8 target website" -- again -- "has, at a minimum, knowingly  
9 accessed the target website with intent to view" -- "intent  
10 to view" -- child pornography, or attempted to do so."

11           So the version of 23 -- what those paragraphs make  
12 sure, make very clear, is that the interpretation of  
13 paragraph 23 that the government has pressed to this Court  
14 and that the magistrate surely accepted and that this Court  
15 has accepted twice in its two opinions denying our motion to  
16 compel -- that the -- 23, the FLA was describing the web --  
17 the user's activity on the site, that the FLA was suggesting,  
18 hey, this person was viewing or downloading child pornography  
19 on the site, we have evidence of that. That is wrong. We  
20 know that is wrong because the agents never repeated it.

21           There is no possibility -- in my experience, there is  
22 no possibility that an experienced FBI agent who has  
23 evidence, who thinks there is evidence of someone actually  
24 viewing or downloading child pornography is going to  
25 summarize his case for probable cause as simply going to this

1 website, which is what he did in 29 and 30. Why on God's  
2 green earth -- if you're an FBI agent and you have evidence  
3 and you believe that you have evidence of an IP user viewing  
4 or downloading child pornography, why in God's green earth  
5 are you going to rely on the simple fact that he visited the  
6 website?

7 Now, the government has said, well, in part --  
8 they've mentioned many different things. The government I  
9 think refuses to be pinned down in this case. It is very  
10 frustrating and I think it is actually very difficult for  
11 this record because they refused to say what happened here,  
12 what the agent actually understood. What they seem to be  
13 sort of saying now is, oh, well, that's him walking it back,  
14 that's him saying, actually, 23 is not true and all we have  
15 is this. They say that on pages -- they make this argument  
16 in their opposition.

17 That's not -- you can't unring the bell in that way.  
18 You cannot put out there, there is evidence of this IP user  
19 viewing or downloading child pornography and then later say  
20 our evidence is that he visited the website. That doesn't  
21 walk it back. That doesn't correct it. You can't unring the  
22 bell that way. Once you put that out there and the  
23 magistrate has checked that little box off mentally in the  
24 probable cause analysis, look, there is evidence of him  
25 viewing or downloading child pornography, I don't have to

1 think any more on this. That avoids much harder and truthful  
2 cases they should have made and they did not make in this  
3 affidavit, which was to say, going to this website one time  
4 for one second is enough for probable cause. That's the case  
5 they needed to make. That's the honest case. That's the  
6 case that would have been consistent with their obligations,  
7 and that's a case that would not have triggered a *Franks*  
8 hearing. Now, it would have triggered a very different  
9 motion which was that's not probable cause, but it would not  
10 trigger a *Franks* hearing. What you cannot do is repeat the  
11 FLA's tip, which of course suggests that the person viewed or  
12 downloaded child pornography, as the Court has accepted  
13 twice, and then just walk away from that, and then say, okay,  
14 well, we put that out there, we're not going to qualify it,  
15 we're not going to go back and clarify it, we're not going to  
16 do anything. You can't do that. Once you put that out  
17 there, you're responsible -- you're responsible for the truth  
18 of that information and you're responsible for the impression  
19 that that leaves on a magistrate or a judge. That is their  
20 obligation. And anything less does give us a *Franks* hearing,  
21 Judge. That agent knew that there was no evidence of  
22 downloading child pornography, there was no evidence of any  
23 activity on the website, that it was just visiting the  
24 website.

25 Now, how else do we do this? His own internal report

1 submitted three months -- submitted in January, which is I  
2 think a month -- or several weeks before the affidavit was  
3 filed, and that's already in evidence -- and what that says  
4 is, in his own internal report, "In August 2019, the FBI  
5 received information from a foreign law enforcement agency  
6 known to the FBI and with a history of providing reliable,  
7 accurate information in the past, that FLA" -- again --  
8 "advised a user who accessed [REDACTED] using IP address"  
9 such-and-such on May 23, 2019 at" -- 2:00 -- "02:06:48."  
10 That is an accurate statement of the evidence. They had the  
11 IP user going to that website on one day for one second. It  
12 is stated right here in this internal report. It says the  
13 same thing that he basically repeated in 29. It is the same  
14 thing that he repeated in 30. It is the same thing that's in  
15 6. It's the same thing that is in the title of that section.  
16 But it is fundamentally different for probable cause purposes  
17 from what is in 23, which is that there is evidence of this  
18 user viewing or downloading child pornography.

19 Your Honor, I -- you know, even though we have not  
20 succeeded on our motion to compel and not been able to get  
21 any further information on this, it is clear from the  
22 affidavit itself, it is clear from the 1057, that the agent  
23 knew that all he had was the internet user going there for  
24 one minute for one second. That's it. That's all the  
25 evidence they had.



1           In fact, the government, in Mr. Sanders' bond  
2           hearing, repeated that understanding of the evidence. The  
3           government said, when they were asking for Mr. Sanders'  
4           detention, that the evidence showed that the IP address  
5           linked to Mr. Sanders accessed the website. That's it.

6           You don't need -- if you have evidence of someone  
7           actually clicking on a link to child pornography, downloading  
8           child pornography, joining a website that has, you know, a  
9           child pornography group or something like that -- if you have  
10          any evidence of actual criminal activity, you don't rely on  
11          the fact the person went to the website one time. You would  
12          never do that. No prosecutor would do that. No FBI agent  
13          would do that. And that shows, Your Honor -- the course of  
14          conduct throughout this shows that they knew that they didn't  
15          have the downloading or viewing of child pornography, which  
16          is what 23 suggested, and that's why 23 is misleading. It  
17          just couldn't be more clear from this.

18          You know, the agent said -- I have counted five  
19          different times in the affidavit alone where he said that the  
20          internet user just visited the website. Only one time, in  
21          paragraph 23, did they ever suggest anything more, and that's  
22          when they repeat the FLA tip, which clearly suggests the  
23          internet user viewed or downloaded child pornography.

24          So, you know -- I mean -- you know, if you  
25          take -- the government has made the case here, well, if you

1 correct 23, and, you know, if it is just about going to a  
2 website one time for one second, we still have probable  
3 cause. Okay. We can have that fight. But that is not the  
4 fight that was had here. That is not what was told to the  
5 magistrate. That is not what the magistrate believed, and it  
6 is not what this Court has said. The Court has twice said  
7 that our -- our -- that all -- that this agent had much more  
8 than just going to the website. This Court has said that the  
9 agent had him doing these things on the website, using --  
10 viewing online exploitation material on the website. With  
11 all respect, I understand why the Court was led to that  
12 conclusion. Respectfully, that is wrong. They just didn't  
13 have that. Although 23 suggested it, they didn't have that  
14 evidence. And that is the fundamental problem here. The  
15 whole affidavit is built on a misrepresentation. Now, if  
16 there is some good faith argument the government has about  
17 why that happened, then that's fine, and that should be at  
18 the *Franks* hearing.

19 There is no question we have made a substantial  
20 preliminary showing of why we get a *Franks* hearing and that  
21 this affidavit is misleading.

22 Your Honor, you know . . .

23 (Pause)

24 I suppose -- you know, again, the agent has submitted  
25 a declaration to this Court. In addition to submitting an

1 affidavit, the government had him submit a declaration, sworn  
2 declaration to this Court. But that declaration does not say  
3 that he understood that the FLA had evidence of Mr. Sanders  
4 viewing or downloading child pornography. The declaration  
5 doesn't say that. Surely, the government has discussed this  
6 matter with him. So why are we not getting a statement, some  
7 representation about what the agent understood? The answer  
8 to that question is the agent understood that 23 was not  
9 correct. He understood that 23 was misleading. That's why  
10 he didn't repeat it himself in all those other paragraphs. I  
11 can't say, hey, on this date, you know, my informant who has  
12 this long history of reliability, on this day, he said he saw  
13 Mr. Smith buy cocaine and he saw him take it, give him money,  
14 buy cocaine, and then just leave that there, even though you  
15 know it's misleading. I don't think we need to look hard at  
16 the caselaw to know you just can't do that. If you know that  
17 is an accurate misstatement of the evidence, especially on an  
18 issue that is important, as in paragraph 23, which is the  
19 whole crux of the affidavit, the whole case for probable  
20 cause, you need to make sure that that magistrate understands  
21 that that actually is not -- if we don't do that, if we can't  
22 enforce that rule, then this whole process is -- we're going  
23 to lose, we lose the reliability, which is the critical thing  
24 of this entire process. If we can't make sure that when they  
25 repeat the most important part of the probable cause case

1 that is not an accurate recitation, then that's a true danger  
2 to the system.

3 Your Honor, with that, I think I want to move on to  
4 the second motion I want to discuss, which is there is just  
5 no probable cause, period, here, even with -- whatever they  
6 say in paragraph 23 means -- paragraph 23 is vague. I think  
7 everyone can recognize that usually you have a much more  
8 concrete tip than that, than just, oh, he accessed online  
9 exploitation material. But even if we're assuming that that  
10 was not misleading, I still -- probable cause -- we have a  
11 separate motion, motion number one, on that. And I want to  
12 address that. I don't know if the Court wants me to make it  
13 now or --

14 THE COURT: You have about 11 minutes left.

15 MR. JEFFRESS: Okay. Your Honor, on that issue, the  
16 Court would have to break new ground to affirm probable cause  
17 here even accepting whatever 23 meant. This is difficult at  
18 this point because, you know, 23 meant -- what 23 meant to  
19 the agent is clear to me, which is that it meant he visited  
20 the website one time. If the question is whether visiting a  
21 website with child pornography one time for one second gives  
22 the government -- even on the TOR -- provides the government  
23 probable cause, that is open and shut, too. There is no case  
24 coming remotely close to upholding a probable cause  
25 determination based on a user's visit one time for one

1 second, which is all the evidence they had here. No cases.

2 Now, they try and say *Bosyk* -- that's the lead case  
3 in the Fourth Circuit, I think, on these issues --

4 B-O-S-Y-K -- *Bosyk* is a case where the court sort of came  
5 close to that. That is not true. They're reading that --  
6 they have *Bosyk* in their brief -- I don't -- I respectfully  
7 very much disagree with that interpretation in this case.

8 There was much more in *Bosyk* linking this -- linking the user  
9 there to criminal activity. I mean, specifically they had  
10 him going there with -- where there was a link that was  
11 clearly child pornography, going to this website at the same  
12 time that that was posted. And so the idea that he clicked  
13 on that link -- they actually had the guy clicking on the  
14 link in *Bosyk*. The facts are just far more incriminating to  
15 establish probable cause than visiting the website one time  
16 for one second. There is no case in the United States where  
17 visiting any website one time for one second has been found  
18 to establish probable cause or even a substantial basis for  
19 probable cause, which would be the test under *Leon*, right.

20 There is no case.

21 In *Bosyk* -- you know, here the website is named [REDACTED]  
22 [REDACTED]. There is not -- although you might wonder what that is,  
23 it is not an obviously -- it is not obviously a website that  
24 would have child pornography. And in fact, this website very  
25 clearly had some illegal content but some legal content too.

1 It was a mix. It was not dedicated to child pornography the  
2 way they portrayed it here. To get to any child pornography,  
3 you actually have to have registered, and you also have to  
4 have gone deep into the website, none of which they said they  
5 had any evidence of in this case, that the affidavit had. In  
6 fact, they didn't have any evidence of that. In *Bosyk*, the  
7 website was named -- it was -- the person went to the link in  
8 the preteen hard-core section, which is an obviously graphic  
9 title which, you know, conveyed the graphic content that was  
10 in there. Now, the same day that 20 video thumbnail images  
11 of child pornography were, quote, placed there, Mr. *Bosyk*  
12 *visited the link to those videos. So unlike in Bosyk, the*  
13 *site the internet user -- unlike in Bosyk,* here the site had  
14 both legal and illegal content. Unlike in *Bosyk*, the  
15 affidavit in support of the search warrant failed to provide  
16 any information about the content that Mr. Sanders -- the IP  
17 address linked to Mr. Sanders allegedly looked at. It didn't  
18 say just, you know, online child exploitation material. It  
19 doesn't say anything about specific images, specific content,  
20 anything like that, because the reality is they didn't have  
21 that. All they had was him going to that website for a  
22 single time for a single second. So if we -- we very much  
23 disagree with their interpretation of *Bosyk*, where there was  
24 much more.

25 The Court here, in order to find probable cause,

1 would really have to break new ground. It would have to say,  
2 going to a website that has a mix of legal and illegal  
3 content just one time for one second is enough to search the  
4 entire family's home. They searched the entire family's  
5 home. They searched 27 different electronic devices that  
6 they were able to find in that home. You know, it was an  
7 exhaustive search. It is not what the Fourth Amendment  
8 requires. It requires much more for probable cause than this  
9 to search a family home, which is -- and all the devices in  
10 it -- which the Supreme Court made clear in *Riley v.*  
11 *California* and other cases where the Fourth Amendment's  
12 protections are at their highest.

13 So, you know, even if you -- we don't take the  
14 truthful case, which is that all they had was going one time  
15 and we take the case that there was a sort of vague  
16 accusation that he actually went on the website and he  
17 accessed online child exploitation material, which there is  
18 no evidence of, but even if we accept that as true, there is  
19 still not enough here. That allegation is far too vague.  
20 You have a tip that came from a foreign law enforcement  
21 agency, which I think the government would agree that there  
22 is zero corroboration of, in terms of the criminal activity  
23 or the suspicious activity that that tip is alleging, there  
24 is zero corroboration, they did nothing else. They took that  
25 and put it in 23 and they put together a bunch of filler,

1       okay. And -- you know, that's what this affidavit is. And  
2       there is just no case where a tip this vague where it doesn't  
3       provide any kind of concrete or specific reason to think that  
4       this internet user engaged in criminal activity. So even if  
5       you accept the tip that, you know, there was online  
6       exploitation material, which doesn't even say exactly what it  
7       was or that it was illegal, that's not enough. That's just  
8       not enough under any case, not just in the Fourth Circuit,  
9       but in the United States. The Fourth Amendment definitely  
10      requires more than what is there.

11               The Court's indulgence.

12               (Pause)

13              MR. JEFFRESS: Thank you.

14              If I can reserve that remaining time for any  
15      rebuttal --

16              THE COURT: There isn't any.

17              MR. JEFFRESS: Thank you.

18              THE COURT: All right. Let me hear from the  
19      government. You're limited, as well, to 30 minutes.

20              MR. CLAYMAN: Thank you, Your Honor.

21              Let's start with the probable cause arguments. The  
22      defendant's assertion this tip was generalized and vague and  
23      therefore unreliable is an argument that's simply not  
24      correct. As Your Honor knows from having reviewed the tip  
25      and the affidavit, the tip came from a well-respected foreign



1 law enforcement agency with a history of providing reliable  
2 information, including this very type of information about an  
3 IP address accessing content on child pornography sites on  
4 TOR. More substantively, Your Honor, the tip provides  
5 specific information about a specific crime. It describes a  
6 specific IP address that was later tied to the defendant that  
7 was used on a specific date to access online child sexual  
8 abuse material on a specific site on TOR that law enforcement  
9 knew to be dedicated to child pornography. That information,  
10 when viewed alongside the other atmospheric information in  
11 the affidavit about TOR, about this website in particular,  
12 but also about its services generally, about the type of  
13 child pornography that was posted on the website, and about  
14 the type of people who view child pornography online, all of  
15 that information taken together provides probable cause to  
16 believe that on a specific date someone in the defendant's  
17 home accessed a specific hidden service dedicated to child  
18 pornography and that this individual likely accessed that  
19 site with the intent to view the content on it, which is  
20 child pornography. And that is a crime under  
21 18 U.S.C. 2252 (a) (4) (B). Accessing a site like [REDACTED]  
22 with the intent to view the content on that site, regardless  
23 of whether or not you view it, is a crime.

24 And Your Honor, I think the defendant's claim that  
25 this tip is a reference to the home page is entirely

1 unsupported by the facts here. The tip uses the term "online  
2 child sexual abuse and exploitation material." Contrary to  
3 what the defendant suggests, these terms have meaning, these  
4 words mean something. And I think the most common sense and  
5 logical reading of this tip is the same one that Your Honor  
6 reached, which is that the target IP was accessing some sort  
7 of content on this website that is dedicated to child  
8 pornography. Admittedly, we don't know precisely what the  
9 content is, but we have never claimed to know exactly what it  
10 is, or exactly the definition of child pornography under the  
11 United States Code. We also never claimed that the tip  
12 alleges that he downloaded that content. All the tip says is  
13 that he accessed content on this site and that we know that  
14 this site is dedicated to child pornography.

15 What we have also explained in the affidavit, Your  
16 Honor, is that this is a site that is not easy to find. You  
17 can't just stumble upon it if you were conducting a Google  
18 search on the open internet. We have also established in the  
19 affidavit, Your Honor, that based on FBI investigation,  
20 people who access these sort of sites on TOR dedicated to  
21 child pornography rarely do so just once.

22 I think, Your Honor, all of this taken together  
23 provides ample probable cause to believe that someone,  
24 whoever was using the target IP address on this date and  
25 time, knowingly accessed this site with the intent to view

1 what is on it, which is child pornography, and that is a  
2 crime. We have established probable cause to believe that  
3 crime occurred here.

4 Your Honor, I think the caselaw supports these  
5 conclusions. Just to address the *Bosyk* case, in that case,  
6 all the affidavit alleged was that an IP address, on a single  
7 date and time, accessed an open internet file-sharing website  
8 that is otherwise lawful, but they accessed a page on it that  
9 happened to be hosting encrypted child pornography files that  
10 someone can only download if they had a password for it.  
11 There was no allegation that this individual actually  
12 downloaded this child pornography. But Judge Nachmanoff,  
13 Judge Brinkema, and the Fourth Circuit all concluded that it  
14 was reasonable to infer that this individual found the link  
15 on a TOR site dedicated to child pornography; and that  
16 because this individual was on that kind of site, he knew  
17 what he was looking at was likely someone to be viewing child  
18 pornography online.

19 I think, more importantly, Your Honor, what *Bosyk*  
20 tells us is that in order to establish probable cause, an  
21 affidavit doesn't need to rule out every possible innocent  
22 explanation for the conduct described. All it needs to do is  
23 provide a fair probability that the more incriminating  
24 version of events occurred. So here the affidavit doesn't  
25 need to rule out every possible way the target IP address

1       accessed whatever this material is on [REDACTED]; but rather,  
2       just needed to establish the fair probability that the user  
3       of the IP knew what the site was and accessed the material on  
4       it intentionally.

5               As I mentioned before, Your Honor, the FLA's tip,  
6       combined with all the other information in the affidavit,  
7       plainly tells us that this individual likely knew what the  
8       site was and likely knew what he was going to be accessing by  
9       going onto the site.

10              Turning now to the *Franks* arguments, Your Honor, with  
11      respect to paragraph 23, this issue has been thoroughly and  
12      repeatedly briefed. Your Honor has already reviewed the tip  
13      and the information in paragraph 23 and concluded that the  
14      affidavit accurately recites the tip based on a plain reading  
15      of what the tip documents are. Since the outset, the  
16      defendant has taken the view that the tip must mean something  
17      other than what it plainly states. But to date, he hasn't  
18      provided any actual proof of what that is beyond his own  
19      speculation, reading the tip and speculating what the affiant  
20      must have thought about this tip.

21              Without a far more substantial showing, Your Honor,  
22      the defendant cannot sustain his burden under *Franks* to  
23      obtain a *Franks* hearing; in particular, because his  
24      allegations are centered on omissions, which actually require  
25      a heightened standard than if they were centered on some sort

1 of falsehood in the affidavit.

2 Regarding paragraph 25, Your Honor, this issue has  
3 also been thoroughly briefed with the same outcome. Your  
4 Honor has reviewed the paragraph, reviewed the tip, and  
5 concluded that the affidavit accurately recites the tip.

6 And the defendant once again, Your Honor, has come up  
7 with a theory about how the tip is misleading or a flat-out  
8 lie, but if you look at all the briefing in this case, Your  
9 Honor, which includes I think up to this point probably  
10 10-plus filings on this issue and related issues, the  
11 defendant has yet to submit a single declaration from a  
12 single expert who has agreed with him that it would have been  
13 impossible for the FLA to obtain this information that's in  
14 the tip. He is the only person making that accusation  
15 because all the experts know, the FBI knew, that it would  
16 have been possible for the FLA to have obtained this target  
17 IP address without searching the computer.

18 And so again, Your Honor, I don't think that provides  
19 any basis for us to conclude that the tip must have been a  
20 lie, that the FBI must have known it was a lie, and without  
21 that sort of showing, Your Honor, the defendant can't sustain  
22 his burden to prove that there is any falsehood or any sort  
23 of material intentional omission in the affidavit. So we  
24 think the motion for a *Franks* hearing on paragraph 25 should  
25 be denied, as well.

1 I would like to then just address the sort of at  
2 large motion for a *Franks* hearing based on various  
3 allegations about the affidavit. In particular, with respect  
4 to the target website, the defendant has suggested that the  
5 website wasn't dedicated to the advertisement and  
6 distribution of child pornography. But to date, he does not  
7 appear to have an actual basis to make that claim. As far as  
8 I can tell, he has singled out a single detail from the FBI's  
9 description on the website, which states that it was  
10 dedicated to 18 (twinks and under) and focused on that detail  
11 solely, while ignoring all of the other significant  
12 information in the affidavit and the investigation the FBI  
13 has done into the website to conclude that it is, in fact,  
14 dedicated to child pornography. And those details include  
15 descriptions of subforums which are titled "Toddlers,  
16 Preteen, and Teens.) Notably, there is no adult subforum.  
17 It also describes the content that was posted on this  
18 website, which is explicitly child pornography, and finally  
19 describes where this website could have been found on TOR,  
20 which is on direct research of sites that list multiple sites  
21 that you can access child pornography on the TOR network.

22 The last issue I would like to address, Your Honor,  
23 is the arguments regarding whether the defendant's IP address  
24 could have accidentally stumbled upon this website through a  
25 search engine. With respect to that issue, Your Honor, I

1 think the defendant is responding to something that is not  
2 actually in the affidavit. The affidavit doesn't claim that  
3 there is absolutely no way someone could search the TOR  
4 network to find TOR hidden services. All the affidavit says  
5 is that hidden services are not indexed to the same degree at  
6 all as websites are in the open internet, meaning that it is  
7 not as easy to search for hidden services on TOR than it  
8 would be to go to Google and search for open internet  
9 websites.

10 The defendant's expert doesn't appear to disagree  
11 with that. He just suggests that, well, no, you can actually  
12 search for hidden services. So, Your Honor, if you look at  
13 what the declaration states, I think that even if we included  
14 that information, it would only bolster our probable cause  
15 analysis here. Because what the declarant says is that, hey,  
16 I'm a computer expert, I found a search engine on TOR that  
17 searches hidden services, I conducted a search for the  
18 Department of Justice, which yielded five responses. Just  
19 this morning I conducted an open internet search for the  
20 Department of Justice, and it yielded over a billion  
21 responses. And that is exactly what the affidavit is trying  
22 to convey; that hidden services aren't indexed to the same  
23 degree as open internet websites, meaning that is simply not  
24 as easy to Google and stumble upon hidden services on the  
25 open internet.

1           For that reason, Your Honor, I don't think any of the  
2           other alleged omissions or potential falsehoods the defendant  
3           has identified in his other motion are at all material, so we  
4           would ask that you deny that motion, as well.

5           Unless Your Honor has any specific questions about  
6           probable cause or the *Franks* argument, we would otherwise  
7           rest on the briefing in this matter.

8           THE COURT: All right. Thank you.

9           MR. JEFFRESS: Your Honor, could I --

10          THE COURT: Well, your time is up, but I will give  
11          you a few more minutes. Do you need more than two minutes or  
12          so?

13          MR. JEFFRESS: No. Thank you.

14          THE COURT: Go ahead.

15          MR. JEFFRESS: Your Honor, I think that that was more  
16          notable for what they didn't say than what they did. Once  
17          again, the government is not saying, has never told this  
18          Court, that the agent -- what the agent's understanding of  
19          what paragraph 23 was, whether he thought that to be  
20          accurate, and that is because they don't even know.

21          Secondly, they didn't answer any of the questions  
22          that we raised during our argument. Why would the agent  
23          summarize this whole case for probable cause in paragraphs 29  
24          and 30 of the affidavit as just based on Mr. Sanders having  
25          visited the website if they had much more incriminating



1 evidence of Mr. Sanders viewing or downloading child  
2 pornography, which is what they suggested in paragraph 23.  
3 There is no agent in the history of FBI agents who would do  
4 that. And that is because he knew the suggestion in 23 was  
5 false and he know that the real -- that the real case was  
6 that all the FLA had was going to that website for one  
7 second. So, you know, he can come here and explain that.

8 But whether we have made a substantial preliminary  
9 showing in order to get a *Franks* hearing is very clear. And  
10 the government hasn't responded to it. They haven't  
11 responded to it here, they haven't responded to it in their  
12 papers. And they haven't responded to what the 1057 said,  
13 too, which is an accurate and truthful recitation of the  
14 government's evidence; that all they had was the person  
15 visiting [REDACTED].

16 So, Your Honor, for those reasons -- also, on *Bosyk*,  
17 Your Honor, we went back and looked at the government's  
18 briefing on that case, and what the government said in that  
19 case, in their brief, they said, "While merely joining an  
20 E-group," meaning a website like this, "without evidence that  
21 an individual either attempted to or did acquire illicit  
22 material falls short of the Fourth Amendment requirements. A  
23 click of a URL that was advertising child pornography does  
24 establish probable cause." So in *Bosyk*, they admitted that  
25 even if -- even if Mr. Sanders had registered for this

1 website, which there is no evidence he did at that time, if  
2 they said -- even if they had him registering for it, that  
3 would not be enough. Okay. That's what they said in *Bosyk*  
4 to Judge Brinkema, but the fact that the guy went and clicked  
5 on something, clicked on specific content of child  
6 pornography, that's enough.

7 THE COURT: All right.

8 MR. JEFFRESS: They don't have either of those  
9 things, Your Honor.

10 Thank you, Your Honor.

11 THE COURT: That was a new point. Do you want to say  
12 anything about it? I think it is in the briefs, but you may  
13 take 30 seconds or so to respond.

14 MR. CLAYMAN: Your Honor, I think this issue has been  
15 adequately briefed, and we will rest on our papers.

16 THE COURT: All right. I will take the matters under  
17 advisement and resolve them as soon as practicable.

18 This hearing was held under seal because of the  
19 importance of keeping confidential the government's  
20 investigatory procedures. However, I give the parties the  
21 opportunity, if they wish, to file motions to remove the  
22 seal, and I will be happy to consider those. I think as much  
23 as possible in this or any case should be out of seal and in  
24 the public view.

25 All right. I thank counsel.

1 MR. JEFFRESS: Your Honor, we have to apparently get  
2 an order, because it is under seal, in order for us to get a  
3 transcript. The Court may need an order. So we can either  
4 submit something -- I don't know if the Court can do that  
5 now.

6 THE COURT: No, you don't need an order. If you are  
7 counsel for a party, you can get a transcript under seal if  
8 you pay for it, and you must treat it as under seal.

9 MR. JEFFRESS: Of course.

10 THE COURT: All right? Anything further today?

11 MR. JEFFRESS: No, Your Honor.

12 MR. CLAYMAN: No, Your Honor.

13 THE COURT: I thank counsel for your arguments and  
14 your cooperation.

15 The Court stands in recess until 1:00.

16 (Proceedings concluded at 11:34 a.m.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

## SEALED TRANSCRIPT

35

## 1 CERTIFICATE OF OFFICIAL COURT REPORTER

2  
3 I, Patricia A. Kaneshiro-Miller, certify that the  
4 foregoing is a correct transcript from the record of  
5 proceedings in the above-entitled matter.  
6  
7

8 /s/ Patricia A. Kaneshiro-Miller

September 18, 2020

9 PATRICIA A. KANESHIRO-MILLER

DATE

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
PATRICIA A. KANESHIRO-MILLER, RMR, CRR  
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA